## INDEX.


| | Page |
|---|---|
| COURT ORDERS AS FINAL JUDGMENT | 7 - 8 |
| JURISDICTION | 1 |
| QUESTIONS PRESENTED | 2 |
| STATEMENT AND GROUNDS | 3 |
| REASONS FOR GRANTING THE WRIT | 4 |
| TRIAL COURT IN ERROR | 4 |
| CONCLUSION | 4 |
| APPENDIX A—Court Order of United States Court of Claims | 7 |
| APPENDIX B—Rehearing Denied By United States Court Of Claims | 8 |
| APPENDIX C—Certificate Of Certified Record | 9 |
| APPENDIX D—Affidavit Of Service By Mail | 10 |

## CITATIONS.

Marcos v. The United States (1952) 106 F. Supp. 172, 122 Ct. Cl. 641 ... ... ... ... ... ... ... ... ... ... ... ... ...

De Arnud v. The United States Ct. Cl. 1894, 14 S. Ct. 374, 151 U. S. 493, 38 L. Ed 244 ... ... ... ... ... ... ... ... ...

## CODE AND RULES.


| | Page |
|---|---|
| United States Court Of Claims Rule 13 (2) and 22 (b) ... | 2 |
| United States Public Law 85-56, 71 Stat. 172 ... ... ... ... | 2 |
| 28 U. S. C. Sections 1255 and 1491 ... ... ... ... ... ... ... | 1 - 3 |
| 10 U. S. C. Sections 1218 and 1219 ... ... ... ... ... ... ... | 2 |
| 10 U. S. C. Section 1372 (4) ... ... ... ... ... ... ... ... ... | 2 |

IN THE

# Supreme Court of the United States

—

OCTOBER TERM, 1966

—

No.

—

FREDERICK COLLINS FERMIN
*Plaintiff And Petitioner*

*v.*

THE UNITED STATES
*Defendant And Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS 1325 "K" STREET N. W. WASHINGTON, D. C. 20005

### COURT ORDERS

No written opinion was made by the United States Court of Claims. Therefore the case is unreported see Court Order in Appendix A page 7 and Appendix B page 8.

### JURISDICTION

The order and final judgment of the Court Of Claims was entered on December 2nd 1966 denying the Plaintiff's Petition for failure to state a claim within the jurisdiction of the United States Court Of Claims. On December 19, 1966 a Petition for rehearing was filed; rehearing was denied on February 17, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

## QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES COURT OF CLAIMS BY ITS ORDER AND FINAL JUDGMENT HAS ERRED BY MAKING FINAL DETERMINATIONS WITH RESPECT TO EVERY LEGAL AND FACTUAL ELEMENT OF THE CASE REGARDING PLAINTIFF'S AND PETITIONER'S CLAIM THAT THE HONORABLE DISCHARGE WD AGO FORM 53-55 ISSUED ON FEBRUARY 5, 1947 IS VOID AS PER CERTIFICATE OF DISABILITY WD AGO FORM 40. THIS CLAIM IN QUESTION WAS SUBMITTED IN PLAINTIFF'S AND PETITIONER'S REPLY BRIEF AUTHORIZED BY COURT OF CLAIMS RULE 13 (2).

2. WHETHER PLAINTIFF'S AND PETITIONER'S SIGNATURE IS LEGAL ON THE CLAIM REGARDING ITEM 32 OF WD AGO FORM 40 DATED JANUARY 31, 1947 AS DIRECTED IN 10 U. S. C. SECTIONS 1218 AND 1219 SUPPORTED BY SAVINGS PROVISIONS SECTION 2303 OF THE UNITED STATES PUBLIC LAW 85-56, 71 STAT. 172.

3. WHETHER THE WD AGO FORM 53-55 DATED ON FEBRUARY 5, 1947 AND VETERANS ADMINISTRATION CLAIM ON ITEM 32 OF WD AGO FORM 40 ARE TO BE JUDGED AS COMMERCIAL PAPERS.

4. WEATHER THE CAREER COMPENSATION ACT OF 1949, 63 STAT. 802 SECTIONS 411 AND 412 WAS MADE RETROACTIVE TO REGULAR ENLISTED PERSONNEL DISCHARGED FOR DISABILITY PRIOR TO OCTOBER 1, 1949.

5. WHETHER PLAINTIFF AND PETITIONER IS ENTITLEDTO THE RIGHT AS STATED IN 10 U. S. C. 1372 (4). THE ABOVE FORMS IN QUESTION ARE LOCATED IN THE CERTIFIED RECORD OF THE UNITED STATES COURT OF CLAIMS.

## STATEMENT

The Federal jurisdiction in the Court of first instance is authorized in 28 U. S. C. 1491 as requested in Rule 23 (g) of this Court.

## BACK GROUND ON CASE IN HAND AS PER QUESTIONS PRESENTED

Petitioner filed application for correction of his Military Records under the provisions of Air Force Regulation 31-3. In the certified record of The United Stated Court of Claims Mr. Frank D. Hardin Executive Secretary for the U. S. Air Force Board for the Correction of Military Records has officially certified that no error or injustice has been committed on Petitioner's Military Records. Therefore Petitioner's claim was denied on April 1965. Petitioner filed suit against Respondent on April 29, 1966 for Retirement Rights. Grounds for the legal action is based on six (6) errors on the separation papers from the United States Army Air Corp. Petitioner should have not been ordered to sign the Honorable Discharge WD AGO Form 53-55 dated on February 5, 1947 ɛee 10 U. S. C. Sections 1218 and 1219. The other five (5) errors are located in the certificate of disability for discharge dated 31 January 1947. The injustice are on WD AGO Form 40. The medical Board of the United States Army fail to state on item 7A of the WD AGO FORM 40 that Petitioner has a service-connected disability for arthitis of the spine. The Board also fail to inform the next of kin that Petitioner was mentally incompetent and that a legal guardian was necessary before Petitioner could officially be discharged from the United Stated Army Air Corp. See 10 U. S. C. Sections 1218 and 1219. Date of discharge is wrong on item 26 of WD AGO Form 40. Item 32 of WD AGO Form 40 is also out of order based on the fact Petitioner could not sign commercial papers as directed by the Medical Board. Item 34 is also wrong because Petitioner was in combat duty during World War II. The certified record of the United Stated Court Of Claims can prove that the above errors have been committed and that Petitioner requested the Court Of Claims to correct the errors or injustice since the Office of the Secretary of the United States Air Force refuse to correct said errors.

## REASON FOR GRANTING THE WRIT.

1. The United States Court Of Claims has erred because this Court does have jurisdiction to grant Plaintiff's and Petitioner's original Petition as prayered since Petitioner is claiming that he is to be considered as being on active service from the time Plaintiff or Petitioner received his separation papers on February 5. 1947 based on a void Honorable Discharge from the United States Army Air Corp. See 28 U. S. C. 1491 and 10 U. S. C. Sections 1218 and 1219 supported by savings provisions United States Statutes At Large 85th Congress 1st Session 1957 Vol. 71 page 172 Section 2303 which reads as follow:

> «Nothing in this Act, or any amendment or repeal made by it, shall affect any right of any person based on a contract entered into before the effective date of this Act, or such amendment or repeal.»

2. Petitioner's enlistment in the Regular Army Air Corp on May 29th 1946 which is legally a official contract for three years but Resuondent discharged Petitioner on February 5, 1947. Upon discharge from the United States Army Air Corp on February 5, 1947 no legal guardian or notification to the next of kin was appointmented to sign legal and commercial papers on behalf of Petitioner.

## CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully sumbitted,

FREDERICK COLLINS FERMIN
Attorney In Propia Persona.
Peña Pintada, 8 (Mirasierra).
Madrid-20, Spain.

## APPENDIX A

—

IN THE UNITED STATES COURT OF CLAIMS

—

No. 135-66

—

FREDERICK COLLINS FERMIN

*v.*

THE UNITED STATES

—

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS and SKELTON, Judges

—

## ORDER

This case comes before the court on defendant's motion, filed September 28, 1966, to dismiss plaintiff's petition. Upon consideration thereof, together with the opposition thereto, and without oral argument it is concluded that plaintiff's petition fails to state a claim within the jurisdiction of this court, and

IT IS ORDERED that defendant's motion to dismiss plaintiff's petition be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT

WILSON COWEN
Chief Judge.

## APPENDIX B

—

IN THE UNITED STATES COURT OF CLAIMS

| | | |
|---|---|---|
| 467-59 | COASTAL CARGO COMPANY, INC. | |
| 5-62 | JOSEPH COHEN | |
| 7-62 | DAVID M. GOODMAN | v. |
| 107-64 | JOSEPH W. HARRIS | THE |
| 440-65 | JOSE DICHOSA | UNITED STATES |
| 135-66 | FREDERICK COLLINS FERMIN | |

—

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS and SKELTON, Judges, except that SKELTON, Judge, participated only in No. 135-66.

—

### ORDER

These cases come before the court on motions for rehearing, new trial, reconsideration, and for further relief under Rules 68 and 69 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this 17th day of February 1967, that said motions be and the same are denied as follows:

467-59 Coastal Cargo Company, Inc. Defendant's motion for rehearing.

5-62 Joseph Cohen.

7-62 David M. Goodman. Plaintiffs' motion for rehearing.

107-64 Joseph W. Harris. Plaintiff's motion for rehearing or new trial. Judge Durfee and Judge Collins dissent.

440-65 Jose Dichosa. Plaintiff's motion for reconsideration.

135-66 Frederick Collins Fermin. Plaintiff's motion for rehear'n.

BY THE COURT,

WILSON COWEN
Chief Judge.

## APPENDIX C

FREDERICK COLLINS FERMIN

*v.*

THE UNITED STATES

No. 135-66

I, Frank T. Peartree, Clerk, United States Court of Claims, certify that the items contained herein constitute the complete record as filed in this court in the above cause. These papers, for transmittal to the Supreme Court of the United States at plaintiff's request, are as follows:

Originals of:

Plaintiff's petition.
Defendant's motion to dismiss petition.
Plaintiff's reply to motion to dismiss, with documents attached.
Plaintiff's amendment to reply to motion to dismiss, with documents attached.
Defendant's reply brief.
Plaintiff's memorandum of authorities, with letters from plaintiff to the court attached.
Plaintiff's motion for additional evidence to support petition & pleadings.
Court order dismising petition.
Plaintiff's motion for rehearing.
Defendant's opposition to motion for rehearing.

Copy of:

Court order denying motion for rehearing.

IN TESTIMONY WHEREOF I HAVE hereunto set my hand and affixed the seal of the Court of Claims at Washington Cty this 23rd day of February, A. D., 1967.

Clerk, United States Court of Claims.

## APPENDIX D

### AFFIDAVIT OR SERVICE VIA AIR MAIL

Petitioner has served upon the following United States Agency and Attorney of record the Writ Of Certiorari as per Rule 33 of the Supreme Court Of the United States. Also the docket fee of $ 100.00 has been paid for the above Petition.

1. Solicitor General, Departmen Of Justice
   Washingto, D. C.

2. Mr. LeRoy Southmayd, Jr.
   Attorney, Civil Division
   Department Of Justice
   Washington, D. C.

3. Mr. Frank D. Hardin, Executive Secretary
   For The Air Force Board Of Correction
   Of Military Records
   Department Of The Air Force
   Washington, D. C.

Proof of said above service is with the Clerk of the Supreme Court Of The United States Washington, D. C.

# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1277

FREDERICK COLLINS FERMIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

On March 29, 1941 petitioner was inducted into the United States Army, from which he was honorably discharged on September 17, 1945. On May 29, 1946, he enlisted in the Regular Army Air Force with the rank of Staff Sergeant. He was honorably discharged, after he was found by a board of physicians to be disabled, with a Certificate of Disability for Discharge on February 5, 1947, at which time he was transferred to a Veterans Administration facility. He was declared mentally incompetent by a Texas court in January 1947, and the same court declared his competency restored a year later. Petitioner was employed by the federal government from July 1950 to September 1957, at which



263-041—67

time he retired because of disability. In 1965 petitioner applied to the Air Force Board for Correction of Military Records, seeking to be placed on the retirement list pursuant to the Career Compensation Act of 1949, 63 Stat. 802, 10 U.S.C. 1201, *et seq.* His application was denied on April 20, 1965.

On September 28, 1966, petitioner brought suit in the Court of Claims alleging that the Air Force "committed Tort by denying Plaintiff's rights for formal application for Retirement" and seeking an "order to place Plaintiff on retirement with Compensation from date of the Career Compensation Act of 1949." The Court of Claims dismissed petitioner's action for failing to state a claim within the jurisdiction of the court, and petitioner now seeks review of that decision.

1. At the time of petitioner's discharge in February 1947, there was no provision which would have permitted disability retirement of enlisted men with less than 20 years of service.[1] The Career Compensation Act of 1949, 63 Stat. 802, *et seq.*, for the first time permitted disability retirement of enlisted men with less than 20 years' service, but provided, in Section 533(a), 63 Stat. 841, that, except for certain exceptions not here relevant—

> * * * this Act shall become effective on October 1, 1949, and no pay, allowances, or benefits provided herein shall accrue to any person for any period prior thereto.

[1] The Act of June 30, 1941, 55 Stat. 394, provided for the disability retirement of enlisted men with 20 or more years of service. The Act of May 4, 1945, 59 Stat. 135, gave disability benefits to enlisted men with 20 or more years of service who became disabled prior to the effective date of the 1941 Act.

The provisions of the 1949 Act upon which petitioner appears to rely apply only to members on active duty or members retired by reason of disability who were receiving, or were entitled to receive, retired pay on the effective date of the Act. Since there was no provision at the time of petitioner's discharge for the disability retirement of enlisted men with less than 20 years service, petitioner was not—and is not now—entitled to disability retirement pay.

2. Even if petitioner's contentions regarding the 1949 Act were correct, his suit would still not set forth a claim within the Court of Claims' jurisdiction. In the court below, petitioner's theory was that the government "committed Tort by denying Plaintiff's rights for formal application for Retirement" (Petition in the Court of Claims, p. 2). By statutory command, however, the original jurisdiction of the Court of Claims extends only to claims "not sounding in tort" 28 U.S.C. 1491. Cf. *Schillinger* v. *United States,* 155 U.S. 163; *Fort Sill Gardens, Inc.* v. *United States,* 355 F. 2d 636 (Ct. Cl.). And, even if petitioner's claim is viewed as a contractual one, or as a claim grounded upon an Act of Congress, it is barred by the six-year statute of limitations in the Tucker Act, 28 U.S.C. 2501. The essence of petitioner's complaint is the action of the Army Air Force in discharging him in 1947. A suit instituted in 1966 challenging this action was certainly time-barred. And even assuming, *arguendo,* that petitioner's asserted cause of action did not accrue until the

enactment of the Career Compensation Act of 1949, it would in that event also be out of time.[2]

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
*Solicitor General.*

MAY 1967.

[2] Under settled principles, petitioner's cause of action cannot be considered to have arisen upon the later adverse determination of the correction board. See, *e.g.*, *Friedman* v. *United States*, 310 F. 2d 381, 390 (Ct. Cl.), certiorari denied *sub nom. Lipp* v. *United States*, 373 U.S. 932. Nor is his claim a "continuing" one in the sense used by the Court of Claims. See *Friedman* v. *United States*, *supra*, 310 F. 2d at 385; *Diamond* v. *United States*, 344 F. 2d 703, 706–707 (Ct. Cl.).

U.S. GOVERNMENT PRINTING OFFICE: 1967